80-819

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

THE BRISTOL SPRING MANUFACTURING CO.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: November 13, 1980

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NATIONAL LABOR RELATIONS BOARD
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner The Bristol Spring Manufacturing Co. prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Did the National Labor Relations Board and the Court below[1] apply the proper legal standard by requiring a demonstration of an actual subjective impact on voters

[1] The parties to the proceeding were:
The Bristol Spring Manufacturing Company — Respondent
National Labor Relations Board — Petitioner
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW — Intervenor

rather than an objective tendency-to-interfere test in determining if pre-election cash payments to voters disturbed the safeguards necessary to insure fair and free elections.

2. Under the circumstances of this case should pre-election payments to employees at rates up to eight times their normal wages be deemed so grossly disproportionate that they had a tendency to destroy the standards of conduct necessary for a fair NLRB election.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit in an unreported decision, No. 80-4041 (Appendix A), enforced an Order of the National Labor Relations Board, 247 NLRB No. 34 (1980) (Appendix B). The Court had previously remanded, 579 F.2d 704 (2nd Cir., 1978) (Appendix C), a prior Labor Board decision, 231 NLRB 568 (1977) (Appendix D).

JURISDICTION

The Court of Appeals decision issued September 19, 1980. Jurisdiction of this Court is envoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 *et seq.*), are set forth in Appendix E.

STATEMENT OF THE CASE

The National Labor Relations Board conducted an election whose final results showed a one vote majority for a Union.

During the pre-election campaign the Union had conducted employee meetings at local halls and restaurants at times outside Company working hours. The Union's general policy was to reimburse employees for their assistance during election campaigns. When the policy was applied in

this case, the Union did not consider the amount of time spent or the employee's normal earnings but simply paid employees for participating in the preparation of statements being taken to support Union charges against the Company.

The Union made seven $5.00 and four $20.00 payments. Employee recipients were never informed of the Union's policy or the purpose of the payments. The Union simply mailed checks to employees without explanation. The $20.00 payments represented as much as eight times the employees' normal earnings for a similar time period. One recipient believed that the simple act of writing a letter to the Union would result in another $20.00 check.

The Company objected to the election on the basis that the payments to employees constituted improper election interference. The NLRB denied the objections and sought to enforce its Order to Bargain pursuant to Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e). The Court of Appeals initially refused to enforce the NLRB's Order and remanded the case for hearing to determine the effect of the Union's payments.

On remand, the NLRB Administrative Law Judge concluded that this Court's decision in *Labor Board v. Savair Mfg. Co.*, 414 U.S. 270 (1973), and cases cited therein, were not applicable. Although he determined that the amounts paid were disproportionate, he relied upon the employees' assumption that the payments were for their assistance to the Union. He concluded the payments were not related to voting for the Union. The NLRB found *Savair*, supra, did govern the situation but also found that since the value of employees' time could not be definitively calculated, it was not able to say the payments were so grossly disproportionate as to influence the election.

The Court of Appeals did not attempt to resolve these conflicts but simply enforced the Board Order on the basis that it was supported by substantial evidence.

ARGUMENT

1. The Standards to Evaluate Elections Used in This Case Conflict With Decisions of This Court and Other Circuit Courts.

This Court has previously considered the standard to govern the conduct of NLRB elections to be an important federal question. In *Labor Board v. Tower Co.,* 329 U.S. 324, 330 (1946), the Court stated that the duty of the NLRB was to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." In a case involving pre-election inducements, *Savair,* supra, this Court determined that neither an express intent to influence voters nor a demonstration of actual impact on the recipients of a benefit was required to invalidate an election. The Court noted that improper effects on the electorate when pre-election benefits are conferred include:

1. The purchase of endorsements which may paint a false portrait of employee support and be a useful campaign tool:

2. An implied sense of obligation to vote for the grantor of the benefit; and

3. The impact of a conferred benefit to restrain employees who are against the Union. *Savair,* 414 U.S. at 277-281.

Thus, the Court noted with approval the decision in *Collins & Aikman Corp. v. Labor Board,* 383 F.2d 722 (4th Cir., 1967), that payment of $7.00 to an employee for serving as an election observer was an unreasonable or excessive economic inducement *potentially* influencing other employees and was ground to set aside an election. A demonstration of an actual effect on the voters was not required. The test to be applied was whether the conduct has a tendency to influence the election. See also *Labor Board v. Exchange Parts Co.,* 375 U.S. 405 (1964) ($10.00 benefit to employees improper); Cf. *Labor Board v. Commercial*

Letter, Inc., 496 F.2d 35 (8th Cir., 1974); *Kustom Electronics v. Labor Board,* 590 F.2d 817 (10th Cir., 1978).

In *Plastic Masters, Inc. v. Labor Board,* 512 F.2d 449 (6th Cir., 1975), the Court concluded that *Savair* required an election be set aside when an employee was paid less than twice his "lost" wages for serving as the Union's election observer. In *Labor Board v. Gulf States Canners, Inc.,* 585 F.2d 757 (5th Cir., 1978), the Court stated that the tendency to influence test was appropriate and was strictly a question of law.

In the case below, the Administrative Law Judge did not consider *Savair* applicable and thus did not consider the elements set forth above. The NLRB determined that *Savair* did govern but required a demonstration of actual impact on the voters. The NLRB did not explain how it reconciled the elements of *Savair.*

The Court below did not follow the dictates of this Court in *Savair,* and conflicts on this issue with the Sixth Circuit in *Plastic Masters,* supra, and the Fourth Circuit in *Collins & Aikman,* supra.

The question of the application of this Court's principles as set forth in *Savair,* and the standard of conduct to be applied in Labor Board elections is an important federal question which should not be a subject of conflict but should be settled by this Court.

Respectfully submitted,

THOMAS M. CLOHERTY
MURTHA, CULLINA, RICHTER AND PINNEY
Attorneys for the Petitioner

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United States Court of Appeals
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of September, one thousand nine hundred and eighty.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE STERRY R. WATERMAN,

HONORABLE THOMAS J. MESKILL,

Circuit Judges.

Docket No. 80-4041

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BRISTOL SPRING MANUFACTURING CO.,

Respondent.

On application for Enforcement of an Order of the National Labor Relations Board,

This cause came to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the application for enforcement is granted.

1. On January 11, 1980 petitioner National Labor Relations Board issued a Supplemental Order holding that respondent Bristol Spring Manufacturing Co.

("Company") committed unfair labor practices in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5) (1976), and ordered respondent to bargain in good faith with the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251 ("Union") and to provide information necessary for collective bargaining. The Board rejected the Company's contention that it had no duty to bargain because the Union had been improperly certified. The Board found that certain pre-election payments by the Union to several employees in February and March 1976 did not affect the outcome of a representation election held in April 1976, and held the certification to be valid.

2. The NLRB has broad discretion in determining whether there has been a free and fair choice of bargaining representatives. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946). There is no *per se* rule stating that pre-election payments to employees interfere with representation elections. *NLRB v. Bristol Spring Mfg. Co.*, 579 F.2d 704 (2d Cir. 1978); *see NLRB v. Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974). Where these benefits are distributed, a question of fact arises, and the Board must focus on determining whether the payments have the effect of improperly influencing the election. *NLRB v. Gulf States Canners, Inc.*, 585 F.2d 757 (5th Cir. 1978); *Plastic Masters, Inc. v. NLRB*, 512 F.2d 449 (6th Cir. 1975); *Commercial Letter, supra.*

3. The Board found that both the employees who received checks from the Union and those who knew that others had been paid understood that the payments reimbursed employees for their time spent in preparing written statements relating to the discharge of two employees by the Company. The Board reasonably concluded that since the employees did not

view these payments as an inducement to vote for the Union, and that since the checks were distributed one month before the election, the Union's conduct did not affect the election. Because the decision of the Board is supported by "substantial evidence" in the record, its petition for enforcement must be granted. 29 U.S.C. 160(e) (1976); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

4. Although the Company's challenge to the validity of the election was heard at an unfair labor practice hearing rather than a representation hearing, its due process rights were not violated. The Company was afforded ample opportunity to present witnesses and to develop evidence at the unfair labor practice proceeding. It is wholly appropriate to require employers to litigate election claims in the context of an unfair labor practice proceeding after they refuse to bargain with a certified union. *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 445-46 (5th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976); *Commercial Letter*, *supra*, 496 F.2d at 38.

IRVING R. KAUFMAN
STERRY R. WATERMAN
THOMAS J. MESKILL, *Circuit Judges.*

247 NLRB No. 34

FJP
D-5974
Plainville, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

BRISTOL SPRING MANUFACTURING
COMPANY

and Case 1-CA-12714

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW, LOCAL 1251

SUPPLEMENTAL DECISION AND ORDER

On August 24, 1977, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding in which it found that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by refusing to bargain with the Union after it was certified by the Board, and ordered Respondent to take specific action to remedy such unfair labor practice. Subsequently, the Board filed a petition with the United States Court of Appeals for the Second Circuit for enforcement of its Order. Thereafter, on June 12, 1978, the court handed down its decision[2] denying enforcement and remanding the case to the Board for a hearing on the issues raised with respect to the validity of the election, based on the Union's alleged misconduct, and subsequent certification. On September 1, 1978, the Board issued an order reopening the record and remanding the case for a hearing before an Administrative Law Judge. The Board's order directed the Administrative Law Judge to receive evidence in accordance with the court's opinion, and further ordered that, upon conclusion of such hearing, the Administrative Law Judge should prepare a Supplemental Decision.

[1] 231 NLRB 568 (1977).

[2] 579 F.2d 704 (2d Cir. 1978).

On September 4, 1979, Administrative Law Judge Henry L. Jalette issued his Supplemental Decision, attached hereto, in which he concluded that the Union's conduct did not, and was not intended to, interfere with the employees' free choice in the election. The Administrative Law Judge further found that Respondent refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and recommended that the Board reaffirm its requirement that Respondent bargain collectively with the Union, as set forth in its Decision and Order, 231 NLRB 568 (1977). Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed briefs in support of the Administrative Law Judge's Supplemental Decision and in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision[3] in light of the exceptions, briefs,[4] and the court's decision, which the Board has accepted as the law of the case, and has decided to affirm the rulings, findings,[5] and conclusions[6] of the Administrative Law Judge and to reaffirm its original Order.

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[3] The first sentence of Administrative Law Judge's Supplemental Decision inadvertently states that the election in this proceeding was held April 21, 1976, whereas the correct date is April 2, 1976.

[4] Respondent's request for oral argument is hereby denied, as the record, including the briefs, adequately presents the issues and the positions of the parties.

[5] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent also excepted to the nature of the hearing provided as

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bristol Spring Manu-

not in accord with the procedure ordered in the court's remand. Respondent has had ample opportunity to present its evidence and to rebut testimony, and its evidence was reviewed by an Administrative Law Judge and now by the Board. Even assuming, without deciding, that the General Counsel's active participation in the hearing held herein was a departure from his customary role in proceedings of this kind, still it is Respondent's burden to show any prejudice to its substantive rights, and it has not done so. Reversal would be inappropriate in the circumstances of this case, where Respondent has certainly been afforded adequate due process. See *Local 1384, United Automobile, Aerospace, Agricultural Implement Workers, UAW (Ex-Cell-O Corporation)*, 219 NLRB 729 (1975); remanded in unpublished decision, 93 LRRM 2019 (7th Cir. 1976); *N.L.R.B. v. Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974), enfg. 200 NLRB 534 (1972).

Respondent further excepted to the Administrative Law Judge's recommendation that the Board find a duty to bargain on the grounds the Charging Party, herein called Local 1251, was not the certified representative, and there was no evidence of actual or apparent authorization of Local 1251 to act for the certified representative, which was United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). We find no merit in this contention. Respondent received a copy of the charge and the complaint, responded to the complaint, and litigated the case before the Board and the court. Respondent refused to bargain because it claimed union misconduct during the election campaign, not because of lack of authority of Local 1251. At this juncture in the proceedings, on remand from the court to determine the purpose and effect of specific union conduct, Respondent is estopped to assert that Local 1251 had no authority to act for the certified representative. See *Argus Optics, a Division of Argus, Inc.*, 210 NLRB 923, 924 (1974), enforcement denied for other reasons 515 F.2d 939 (6th Cir. 1975).

[6] We do not adopt the Administrative Law Judge's conclusion regarding the effect of the payments of $20 to the extent that it implies that said payments were grossly disproportionate. The Board has never espoused the position that any payments to employees not in direct relationship to actual loss of wages or expenses incurred are inherently destructive of election laboratory conditions. The Administrative Law Judge found, and we agree, that the purpose of the payments was for time spent by the recipients in giving statements in aid of an investigation of unfair labor practice charges. That time, from 1 to 3 hours and

facturing Company, Plainville, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the original Decision and Order reported at 231 NLRB 568.

Dated, Washington, D.C. January 11, 1980

John H. Fanning, *Chairman*
Howard Jenkins, Jr., *Member*
John A. Penello, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

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after normal working hours, involved some inconvenience to the employees. Each of them had to rearrange their evening, leaving their homes, and travel to the location at which the statements were given; two of the four who received $20 took time off from part-time jobs. In light of the fact that the payments were issued within 2 days of the statements and 4 weeks prior to the election; that the intended purpose was to reimburse the recipients for time spent giving their statements; that both the recipients and their fellow employees understood the purpose to be such; and that the value of the recipients' time and inconvenience cannot be definitively calculated, we are unable to say that the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union.

Although we adopt the Administrative Law Judge's conclusion that the payments did not affect the results of the election, we do not agree with his statement that *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), deals only with inducements expressly intended to influence voters and is therefore inapplicable here. We believe that *Savair* does govern preelection payments of the kind made here, but, as the court noted in its remand, it does "not . . . establish a per se rule of invalidity . . . . Whether improprieties exist in any given case is a factual matter." As the Administrative Law Judge's treatment of the effects of the payments actually conforms to the standard set out in *Savair*, we do not disturb his conclusion.

JD-627-79
Hartford, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BRISTOL SPRING MANUFACTURING COMPANY

and Case No. 1-CA-12,714

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1251

Gary H. Glaser, Esq. and *Irwin P. Weiner, Esq.*, of Boston, MA, for the General Counsel.

Thomas M. Cloherty, Esq., of Hartford, CT, for the Respondent.

Mr. Francis X. O'Mealia, of New York, NY, for the Union.

SUPPLEMENTAL DECISION

Statement of the Case

HENRY L. JALETTE, Administrative Law Judge: On April 21, 1976, an election was held in a unit of the above-named Respondent's employees in which a majority of the employees voted in favor of representation by the above-named Union. Thereafter, Respondent filed timely objections to conduct affecting the results of the election which were overruled by the Regional Director, without a hearing, and a certification of the Union was issued. Respondent refused to bargain with the Union on the ground the certification was invalid and, pursuant to the charge herein filed on February 7, 1977, complaint issued on March 15,

1977, which complaint was amended on April 26, 1977. After answer filed, General Counsel filed a Motion for Summary Judgment which was granted by decision of the Board on August 24, 1977.[1] Thereafter, the matter was heard by the Court of Appeals for the Second Circuit on the Board's petition for enforcement, and on June 12, 1978, the Court denied enforcement of the Board's Order, holding that "a substantial and material factual issue" was presented relative to the "purpose and effect" of certain payments of money which the Union had made to unit employees during the pre-election period, and remanding the case to the Board for a hearing on the effects of such payments. On September 5, 1978, the Board issued an order remanding the proceeding to the Regional Director for hearing. On March 14, 1979, hearing was held in Hartford, Connecticut.

Upon the entire record, including my observation of the witnesses, and after consideration of the briefs of the parties, I hereby make the following:

Findings of Fact

I. The Payments

On February 5, 1976, the Union filed a charge against Respondent in Case No. 1-CA-11410. The parties stipulated that on February 19, after working hours, the following named employees of Respondent gave statements to an agent of the Board: Catherine Desjardins Miller, Theresa White, Raymond Markie, Robert Fortin, Marie Morris, Francis Roberts and Peter Podolak. Thereafter, each received a $5 check from the Union dated February 20.

On March 3, after working hours, the following named employees of Respondent, went to a meeting place to give a statement to a Board agent: Mary Jane Landry, Catherine Desjardins Miller, Theresa White and Cynthia Greer. When the agent failed to appear, they gave statements to a Union representative for transmittal to the Board. There-

[1] 231 NLRB No. 85.

after, each received a $20 check from the Union dated March 5.

Of the nine named employees who received payments, five testified concerning the circumstances of their receipt.[2] *Cynthia Greer* testified that no mention of payment was made before she gave a statement, nor was anything said to her afterwards about the reason for the $20 payment. She assumed the payment was because she gave a statement.

Theresa White testified she had not been told of any payment before giving her statements and received no explanation afterwards, but that former employee Francis Roberts told her it was to compensate her for her time.

Peter Podolak testified that after he gave his statement the Union representative asked if he could give him $5 for his inconvenience. Podolak said it wasn't necessary, but shortly thereafter he received a $5 check. Podolak testified that he had signed a Union card before he gave his statement and that the $5 payment did not affect his vote in the election.

Mary Jane Landry testified nothing was said to her about payment before she gave her statement, nor did the Union explain the purpose of the payment afterwards. Landry had signed a Union card and she testified the payment had no effect on the way she voted.

Catherine Desjardins Miller testified nothing was said to her about payment before she gave her statements, nor did the Union explain the purpose of the payments afterwards, but that she assumed the payments were for her taking time off from a part-time job she held. Miller had signed a Union card and attended Union meetings before she gave her statements and she was the Union observer at the election.

The payments in question were authorized by Union representative Tony Brachia. According to Union representa-

[2] Two who did not testify, Marie Morris and Francis Roberts, were alleged discriminatees in Case No. 1-CA-14100 and cast challenged ballots at the election.

tive Francis O'Mealia, such payments were in accord with Union policy to reimburse employees for assistance during a campaign. As the record indicates seven of the payments here in question were for $5 and four were for $20. Ruth Baird, executive secretary of the Union, testified that Brachia had requested $5 payments to the four individuals who gave statements on March 3, but that she had misread his requisition (G.C. Exhibit 7) and erroneously paid each of them $20.

The foregoing is the evidence regarding the purpose of the payments.

As to the effects of the payments, Respondent adduced the following testimony. Employee Richard Zink testified he was asked by Roberts to go to the meeting place (apparently to give a statement), but he didn't. The following week, he had a conversation with Cynthia Greer in which she asked him why he had not done so. He asked her why she wanted to get involved in something like that and she said "what the hell, we got paid $20 for it." She said six people got paid $20 by the Union.[3]

Employee Donald Bernier testified he was aware about payments being made before the election, that the matter was a subject of discussion among employees for about 10 persent of the workday, and that he didn't know why the payments had been made. He testified, however, that there was talk that one Peter Podolak got $5 "for making a statement of this unfair labor practice."

Employee Mary Gaity testified on direct examination that before the election she heard that some employees were paid to vote for the Union. However, she could not remember from whom she heard this and on cross-examination she testified she was not certain when she heard such talk, whether before or after the election.

Employee Susan Trotta testified that before the election she "heard they were getting paid to bring the union in to

[3] The foregoing is based on Zink's prehearing statement which I find more reliable than his testimony at the hearing.

Bristol Springs." She did not know what they were getting paid for.

Employees Markie and Fortin had given statements on February 19 and shortly thereafter, before the election, according to Gregory Baisch, they told him they had each been paid $5 by the Union for giving information.

II. Analysis and Conclusions

As noted earlier, the Court of Appeals remanded this case to the Board for hearing on the effects of the payments above-described.[4] Preliminarily, however, the matter of the purpose of the payments should be resolved. In this connection, the record indicates that the payments were authorized by Union representative Tony Brachia. There is no direct evidence of his purpose as he did not testify,[5] but indirect evidence, not objected to by Respondent, and the record as a whole, establish, and I find, that the purpose of the payments was for time spent by the recipients in assisting the Union, the assistance consisting of giving statements in aid of an investigation of unfair labor practice charges. This evidence consists of the testimony of O'Mealia and Baird, General Counsel's Exhibits 7 and 8, the testimony of Gregory Baisch regarding what he was told, the testimony of Bernier of the talk about Podolak's payment,

[4] The record indicates that in addition to the checks of $5 and $20 dated February 19 and March 5, Catherine Desjardins Miller was paid $20 by check dated April 7, for what appears to have been her services as Union observer. Respondent also offered to prove that Miller was paid $13.50 by check dated April 5. It does not appear that these payments formed part of the Court's remand; nevertheless, they have been considered. Inasmuch as they were dated after the election, they could not, in my judgment, form the basis for setting aside the election, particularly where the recipient, Miller, gave testimony, which I credit, that she was not promised any payments for her services before the election. Thus, this case is distinguishable from *Plastics Masters, Inc.* v. *N.L.R.B.*, 512 F.2d 449 (C.A. 6, 1975) and more like *N.L.R.B.* v. *Basic Wire Products, Inc.*, 516 F.2d 264 (C.A. 6, 1975).

[5] General Counsel represented that Brachia had had a heart attack and was no longer employed by the Union.

Podolak's testimony, and Zink's testimony regarding what Greer told him.

It would seem, therefore, that *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270 (1973) and other cases[6] dealing with inducements expressly intended to influence voters in a representation election are not applicable here. Nevertheless, payments to employees in a pre-election period purportedly for reasons other than the influencing of voters may form the basis for setting aside an election if the payments, regardless of purpose, are made under circumstances that can be said to have a tendency to affect the results of an election. Thus, in *Collins and Aikman Corp. v. N.L.R.B.*, 383 F.2d 722 (C.A. 4, 1967), the Court found that the economic inducement to an employee to act as the Union observer to be excessive and grounds for setting aside an election. In *Plastics Masters, Inc. v. N.L.R.B., supra*, the Court made a similar finding. On the other hand, *N.L.R.B. v. Commercial Letter, Inc.*, 496 F.2d 35 (C.A. 8, 1974), the Court upheld a Board finding that payments to employees for attendance at a representation hearing were not improper. In *Quick Shop Markets*, 200 NLRB 830, the Board found nothing improper in the Union's payment of $15 to election observers. From these cases, it can readily be seen that whether payments are improper in any given case is essentially a question of fact.

I have already found that the purpose of the payments herein was proper. The only remaining question is the effects of the payments on the results of the election. Effects can be considered from two perspectives, subjectively and objectively. Viewed subjectively, the payments cannot be said to have had an effect on the results of the election. Every recipient who testified at the hearing and who was questioned as to the issue (White, Podolak, Miller and Landry) testified that his receiving payment had no effect on how he voted in the election. None of the other em-

[6] See, e.g., *N.L.R.B.* v. *Gorbea, Perez & Morell*, 328 F.2d 679 (C.A. 1, 1964); *Amalgamated Clothing Workers* v. *N.L.R.B.*, 345 F.2d 264 (C.A. 2, 1965); *Wagner Electric Corp.*, 167 NLRB 532.

ployees who testified about hearing of the payments gave any indication that what they heard affected their decision to vote for or against the Union.

In the final analysis, however, the test of interference is an objective one, that is the tendency of the conduct in question to interfere with the results of an election. In my judgment, on the facts of this case, I find that the payments had no such tendency. In the cases of recipient Podolak, Landry and Miller, they were card signers (hence Union supporters) before the payments were ever made. In all cases, the payments were made shortly after the individuals gave statements so that if they did not know expressly why the payments were made, they assumed the payments related to the assistance they rendered the Union. In the circumstances, as the payments were only remotely related to Union support, there would be no reason for the employees to feel obligated to vote for the Union in the election.

Of course, other employees who heard of the payments could conceivably have been influenced by the fact. However, the record does not indicate that any were. Employee Zink's information came from Greer and she did not link payment with voting. Employee Bernier's testimony regarding the amount of talk about the payments among employees was vague and appeared to me to be exaggerated and not deserving credence. Yet, even he admitted that Podolak told him the reason for the payment was for making a statement. Employee Baisch was given similar information.

As to employees Gaity and Trotta, I deem their testimony to be worthless. Gaity could not testify that she heard about the payments before the election and Trotta's testimony does not even appear to relate to the payments here in question.

In its brief, Respondent contends that the payments should be deemed improper because the employees were not told the purpose of the payments. I can see no basis in law or policy to make such a finding. As I have already in-

dicated, the facts in the record demonstrate that the purpose of the payments was to reimburse employees for time spent in giving assistance to the Union, the employees understood the reason for the payments, and no employee believed that the payment had anything to do with how he or she voted.

Respondent argues that the payments were improper because they were disproportionate to the employees' normal earnings. I see no merit to that argument where the $5 payments are concerned. As to the $20 payments, I credit the testimony of Ruth Baird that the amount paid was due to her error. This accounts for the disproportion, but it leaves open the question of the effects of such disproportion on the results of the election. While the amount was pleasing to Greer, so much so that she tried to give a second statement, there isn't the slightest indication it had any effect on how she voted. The significant fact is that she assumed that the payment, however generous, was for giving a statement. Landry was troubled by the payment to the extent that she testified if the Union had said anything to her about payment she would have backed off, because she ". . . would have felt they were trying to buy my vote, or something." Why she would have felt that way is not clear, but it was a feeling that had nothing to do with the size of the payment. In any event, the issue is not what might have been, but what was, and Landry testified unequivocally that her receipt of the check had no effect on how she voted in the election.

General Counsel contends that the payment of $20 was not grossly disproportionate to the employees' wage rates to warrant setting aside the election. I have difficulty with the contention in light of the fact that admittedly the Union only intended to pay $5 and inadvertently paid $20. In my judgment, even if the payment was disproportionate, in light of the purpose of the payments, the recipients' understanding of that purpose, and the timing thereof some 4 weeks before the election, a finding that the payments were objectionable is not warranted.

For the foregoing reasons, I find that the Respondent's objections to the election with regard to the payments lacked merit and were properly overruled by the Regional Director, and that the Union was properly certified as exclusive representative of Respondent's employees in the appropriate unit. Accordingly, I recommend that the Board affirm its finding that Respondent has refused to bargain with the certified Union in violation of Section 8(a)(5) and (1) of the Act, and its requirement that Respondent bargain collectively with the Union as set forth in the Board's Decision and Order published at 231 NLRB No. 85.

Dated, Washington, D.C. September 4, 1979

HENRY L. JALETTE
Administrative Law Judge

C1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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579 F.2d 704
(2nd Cir., 1978)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BRISTOL SPRING MANUFACTURING CO.,
Respondent.

Before:

KAUFMAN, *Chief Judge,*
SMITH and MESKILL, *Circuit Judges.*

Petition to enforce order of National Labor Relations Board requiring Bristol Spring Manufacturing Co. to desist from unfair labor practices, and to bargain with and provide necessary and relevant information to the union.

Petition denied.

SUSAN S. MCDONALD, Attorney, National Labor Relations Board, Washington, D.C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Marjorie S. Gofreed, Attorney, National Labor Relations Board, Washington, D.C., of counsel), *for Petitioner.*

WILLIAM M. CULLINA (Murtha, Cullina, Richter and Pinney, Thomas M. Cloherty, Hartford, Conn., of counsel), *for Respondent.*

SMITH, *Circuit Judge:*

The National Labor Relations Board ("NLRB") petitions this court pursuant to § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e), for enforcement of an order requiring the Bristol Spring Manufacturing Co. ("the Company") to desist from unfair labor practices and to bargain with, and provide necessary and relevant information to, the United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW Local 1251 ("the Union"). 231 NLRB No. 85 (August 24, 1977). The petition of the NLRB is denied for the reasons specified below.

In January, 1976, the Union filed a representation petition with the Board requesting an election in one employee unit of one of the Company's plants. An election was held on April 2, 1976; 43 individuals voted in favor of union representation, 36 against, and seven ballots were challenged. The Company subsequently filed objections to the conduct of the election, alleging that the Union unlawfully interfered with the election in a number of specified ways.

The Regional Director of the NLRB conducted an administrative investigation of the Company's objections, during the course of which all parties were able to submit documentary evidence. No hearing was held. On July 22, the Regional Director recommended that the Company's objections be overruled in their entirety and that the Union be certified as the bargaining representative of the relevant employees.

The Company excepted to the Director's report, requesting that the election be set aside or, in the alternative, that a hearing be held concerning contested issues of fact. On October 6, a three-member panel of the NLRB issued a Decision and Certification of Representation adopting the findings and recommendations of the Regional Director.

Subsequently, the Company refused to furnish information requested by the Union, and refused to bargain with the Union, arguing that the Union was not properly cer-

tified because the election was invalid. It argued further, and for the first time, that an agent of the NLRB involved in the case was subject to a conflict of interest.

The Union filed a complaint with the NLRB pursuant to § 10 of the NLRA, 29 U.S.C. § 160, alleging that the Company was guilty of an unfair labor practice. Subsequently, a three-member panel of the NLRB granted the motion for summary judgment made by the Board's General Counsel, finding the Company in violation of § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1). This petition followed.

Discussion

The Company refuses to bargain with the Union, arguing (1) that improprieties in the conduct of the representation election render that election invalid, and (2) that the Company was improperly denied a hearing on its objections to the conduct of the election.

The Company cites a number of Union practices which it alleges invalidated the representation election as a matter of law. The most serious of these charges, in our view, concerns Union payments to employees prior to the election. The record discloses that cash payments of five dollars ($5.00) were made to each of five employees six weeks before the election, and that payments of twenty dollars ($20.00) were made to four employees approximately four weeks before the election.[1] These payments were allegedly made to reimburse employees for time spent giving statements and attending Union meetings.

The Company cites *NLRB* v. *Savair Mfg. Co.*, 414 U.S. 270 (1973) and the cases cited at footnote 6 of that opinion for the proposition that pre-election benefits of the kind rendered here represent an excessive economic inducement which invalidates representation elections. We do not read

[1] Two employees received both payments, or a total of twenty-five dollars ($25.00); a total of seven employees received payments of some amount.

these cases, however, to establish a per se rule of invalidity. Rather, *the cases establish that cash payments can, under some circumstances, improperly influence an election.* Whether improprieties exist in any given case is a factual matter to be determined, in the first instance, by the trier of fact. See *NLRB* v. *Basic Wire Products, Inc.*, 516 F.2d 261, 264-65 (6th Cir. 1975); *NLRB* v. *Commercial Letter, Inc.*, 455 F.2d 109, 111 (8th Cir. 1972), *order enforced*, 496 F.2d 35 (8th Cir. 1974).

The respondent's additional claims of improprieties in the conduct of the election are without substantial merit. The NLRB's findings of fact with respect to such claims are clearly supported by substantial, undisputed evidence, and the overruling of these claims was entirely appropriate.

The second major challenge posed by the respondent concerns the claimed right to a hearing on the respondent's objections to the conduct of the election. 29 C.F.R. § 102.69, which sets forth the procedures to be followed by a party objecting to an election, indicates that,

> The action of the regional director in issuing a report on objections or challenged ballots . . . may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue . . . [to] the parties a notice of hearing . . . .
> [29 C.F.R. § 102.69(d)]

It is settled law in this circuit that:

> [t]he conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.
>
> [*NLRB* v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970), *cert denied*, 401 U.S. 954 (1971)]

But despite the broad discretion appropriately given to the NLRB in the conduct of representation elections, *Henderson Trumbull Supply Corp.* v. *NLRB, Region 2,* 501 F.2d 1224, 1228 (2d Cir. 1974), *NLRB* v. *Joclin Mfg. Co.,* 314 F.2d 627, 631 (2d Cir. 1963), it is nevertheless the case that a party is entitled to a hearing if, by prima facie evidence, it demonstrates the existence of "substantial and material factual issues" which, if resolved in its favor, would require the setting aside of the representation election. *NLRB* v. *Newton-New Haven Co.,* 506 F.2d 1035 (2d Cir. 1974); *Polymers, Inc.* v. *NLRB,* 414 F.2d 999, 1004-1005 (2d Cir. 1969), *cert. denied,* 396 U.S. 1010 (1970); *NLRB* v. *Joclin Mfg. Co., supra,* 314 F.2d at 631-32.

Such a hearing is required both by the due process clause of the fifth amendment to the U.S. Constitution, *Louis-Allis Co.* v. *NLRB,* 463 F.2d 512, 520 (7th Cir. 1972), *NLRB* v. *Bata Shoe Co., Inc.,* 377 F.2d 821, 825 (4th Cir.), *cert. denied,* 389 U.S. 917 (1967), and by the regulations of the NLRB itself, 29 C.F.R. § 102.69.

In a number of recent cases, this court has refused to enforce orders issued by the NLRB when disputed issues of fact were present, and when the parties were denied an opportunity to present evidence and cross-examine witnesses with respect to those factual issues. See, *e.g., NLRB* v. *Mercy College,* 536 F.2d 544 (2d Cir. 1976); *Henderson Trumbull Supply Corp.* v. *NLRB, Region 2, supra,* 501 F.2d 1224; *NLRB* v. *Joclin Mfg. Co., supra,* 314 F.2d 627.

The purpose of this hearing right is clear. Given the very limited discovery permitted in cases of this type, it is only when parties are given an opportunity to introduce evidence and examine witnesses that improprieties in the conduct of an election may be revealed. As in the case of grants of summary judgment pursuant to Fed. R. Civ. P. 56, it would be manifestly unjust to permit the entry of judgment (or, in this case, the enforcement of the NLRB order), when disputed issues of materia fact remain to be settled. *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 153-61 (1970);

Heyman v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975); *Judge* v. *City of Buffalo*, 524 F.2d 1321 (2d Cir. 1975); *Fournier* v. *Canadian Pacific RR*, 512 F.2d 317 (2d Cir. 1975); 6 *Moore's Federal Practice* ¶ 56.15.

The need for a hearing is particularly acute when, as here, an election is close, for in such a situation, "even minor misconduct cannot be summarily excused on the ground that it could not have influenced the election." *Henderson Trumbull Supply Corp.* v. *NLRB, Region 2, supra*, 501 F.2d at 1230.

In the instant case, the Company avers that certain Union payments to Company employees so tainted the election as to render it invalid. The nature and timing of the Union payments are both material to the resolution of this proceeding, and undisputed. The purpose and effect of the payments are, however, unresolved. We cannot say, as a matter of law, that the payments were so small as to be of no legal significance. Whether and to what extent the payments affected the outcome of the election is a "substantial and material factual issue" which requires a hearing for its determination. Accordingly, we must deny the petition of the NLRB, and remand the case for a hearing on the effects of Union payments.

D—2711
231 NLRB No. 85 Plainville, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRISTOL SPRING MANUFACTURING COMPANY

and Case 1—CA—12714

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW LOCAL 1251

DECISION AND ORDER

Upon a charge filed on February 7, 1977, by United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251, herein called the Union, and duly served on Bristol Spring Manufacturing Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint and notice of hearing and amendment to complaint on March 15, 1977, and April 26, 1977, respectively, against Respondent, alleging that Resonent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 6, 1976, following a Board election in Case 1—RC—14258, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate[1]; and that, commencing on or about October 12, 1976,

[1] Official notice is taken of the record in the representation proceeding, Case 1—RC—14258, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as

and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 28, 1977, and May 9, 1977, Respondent filed its answers to the complaint and amendment to complaint, respectively, admitting in part, and denying in part, the allegations in the complaint and the amended complaint.

On May 12, 1977, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Respondent filed a response thereto on May 23, 1977, entitled "Response to General Counsel's Motion for Summary Judgment." Also, on May 23, 1977, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled "Response to Order to Show Cause and Motion that General Counsel's Motion for Summary Judgment be Dismissed," in which it incorporated therein the matters contained in its "Response to General Counsel's Motion for Summary Judgment." Counsel for the General Counsel subsequently filed an answer thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answers to the complaint and the amended complaint and response to the Notice To Show Cause, Respon-

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amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

dent contests the *validity* of the Union's certification (1) on the basis of its objections in the underlying representation case, and (2) on the grounds that it has no knowledge as to whether or not an appropriate panel of the Board considered the submissions in support of its exceptions to the Acting Regional Director's report and properly executed its Decision and Certification of Representative. In his submissions, the General Counsel contends, *inter alia,* that Respondent is attempting to relitigate representation case matters considered and disposed of in the prior representation proceeding and this it may not do. We agree.

Review of the record herein, including that in Case 1—RC—14258, establishes that, pursuant to a Stipulation for Certification Upon Consent Election, an election was held on April 2, 1976, in which the vote was 43 to 36 with 7 determinative challenged ballots. Thereafter, Respondent filed timely objections to the election alleging Union Conduct essentially as follows: (1) campaign activity designed to create the impression that the Government and the Board endorsed the Union; (2) misrepresentations; (3) financial inducements; (4) threats; and (5) creating an "atmosphere of fear." After investigation, the Acting Regional Director issued on July 22, 1976, a report entitled "Consolidated Report on Objections and Challenged Ballots" recommending that the objections be overruled and that the challenge to one ballot be sustained.[2] Accordingly, since the remaining six challenged ballots were no longer determinative and the Union received a majority of the valid votes cast, the Acting Regional Director recommended that a certification of representative be issued. Respondent filed with the Board detailed exceptions and a brief essentially reiterating its objections, excepting specifically to the Acting Regional Director's failure to consider the Union's payment of the Board agent's lunch as set forth in an attached affidavit,

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[2] The parties had stipulated and the Acting Regional Director found that the voter was ineligible to vote because he was a managerial employee.

and requesting that the election be set aside, or, alternatively, that a hearing be held on its objections. After considering the Respondent's objections and determinative challenges and the report, and after reviewing the record in light of the exceptions and brief, the Board, on October 6, 1976, issued a Decision and Certification of Representative[3] in which it adopted the findings and recommendations of the Acting Regional Director and certified the Union, thereby necessarily finding that Respondent did not raise substantial or material issues requiring a hearing.

In its response to the Notice To Show Cause Respondent again contends that it is entitled to an evidentiary hearing on its objections. As indicated above, the Board's Decision and Certification of Representative necessarily found that Respondent's objections raised no issues requiring a hearing. It is well established that parties do not have an absolute right to a hearing. It is only when the moving party presents a *prima facie* showing of "substantial and material factual issues" which would warrant setting aside the election that it is entitled to an evidentiary hearing[4] and

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[3] In its answer, Respondent contends that it has no knowledge as to whether or not an appropriate panel of the Board considered its objections, exceptions, and briefs including material not previously considered by the Acting Regional Director and whether the panel properly executed the Decision and Certification of Representative. However, the panel that decided the instant case also decided and issued the Decision and Certification of Representative in the underlying representation case and in so doing considered the entire record, including Respondent's objections, exceptions, and briefs. The signed copy of the Decision and Certification of Representative by the three panel members is to be found in the formal file of the representation case (1—RC—14258) located at the Board's Offices in Washington, D.C., and is available for inspection and copying and is not reported in printed volumes of Board decisions.

[4] *N.L.R.B.* v. *Modine Manufacturing Company*, 500 F.2d 914 (C.A. 8, 1974), enfg. 203 NLRB 527 (1973); *Handy Hardware Wholesale, Inc.*, 222 NLRB 373 (1976); *Janler Plastic Mold Corporation*, 191 NLRB 162 (1971); *Crest Leather Manufacturing Corporation*, 167 NLRB 1085 (1967), and cases cited therein.

Respondent has not made such a showing. It is clear that, absent arbitrary action, this qualified right to a hearing satisfies all statutory and constitutional requirements.[5]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

Except as hereafter discussed, all issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

Respondent also contends in its response that the Acting Regional Director assigned the same Board agent, who investigated the earlier unfair labor practice charge against the Respondent in Case 1—CA—11410, to investigate the objections in the underlying representation case, contrary to normal Regional Office practice. Respondent made no showing that this Board agent's investigation of the unfair labor practice charge prejudiced his participation in the underlying representation case to the detriment of Respondent or compromised the integrity of the representation proceedings.[7] Furthermore, Respondent has not shown

[5] *Amalgamated Clothing Workers of America* [*Winfield Manufacturing Company, Inc.*] v. *N.L.R.B.*, 424 F.2d 818, 828 (C.A.D.C., 1970).

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] *Osborn Transportation, Inc.*, 226 NLRB No. 208 (1976); *Kimco Auto Products of Mississippi, Inc.*, 184 NLRB 599 (1970); *Amax Aluminum Extrusion Products, Inc.*, 172 NLRB 1401 (1968).

why this matter could not have been raised in the underlying representation case and, therefore, it cannot be relitigated here.[8]

Further, in its response Respondent contends that granting summary judgment on the issue of its failure to furnish the specific information requested by the Union is unwarranted as the complaint and its amendment, which allege the request for information, failed also to allege that it was "relevant and necessary." We find no merit in this contention. The request for this information as well as the refusal to furnish it as alleged in complaint is admitted by the Respondent's answer.[9] The information requested by the Union herein, such as the names and job classifications of the union employees, and their wages, hours, and other current benefits, clearly constitutes information which has a direct bearing on the negotiation of wages, hours, and other terms and conditions of employment and, therefore, is relevant and necessary.[10] The Board has held that such information encompasses matters which are mandatory subjects of bargaining, and employers are required to provide this information to enable unions to bargain intelligently and to fulfill their obligations as the selected representatives of their employees.[11] We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[8] *Pittsburgh Plate Glass* v. *N.L.R.B., supra,* fn. 6.

[9] Accordingly, we find no merit in Respondent's contention in its response that the factual allegations of par. 11 of the Motion for Summary Judgment are beyond the scope of the complaint, since they are in support of the requests and refusals to bargain alleged in the complaint, which allegations were admitted by the Respondent's answers.

[10] *N.L.R.B.* v. *Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967).

[11] *Dynamic Machine Co.,* 221 NLRB 1140, 1142 (1975); *Irwindale Division of LAU Industries, a Division of Philips Industries, Inc.,* 219 NLRB 364, 366 (1975); *Northwest Publications, Inc.,* 211 NLRB 464, 465 (1974).

FINDINGS OF FACT

I. The Business of the Respondent

Respondent, a corporation organized under the laws of the State of Connecticut, at all times material herein, has maintained its principal office and place of business at 123 Whiting Street, Plainville, Connecticut (herein called the Plainville plant), where it is now and continuously has been engaged in the manufacture, sale, and distribution of precision springs, wire forms, metal stampings, and related products. Respondent, in the annual course and conduct of its business operations, receives at its Plainville plant products and materials valued in excess of $50,000 directly from points located outside the State of Connecticut. Annually, Respondent, in the course and conduct of its business operations, ships from its Plainville plant springs and related products valued in excess of $50,000 directly to points outside the State of Connecticut.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Respondent employed at its Plainville plant, exclusive of

all office clerical employees, salesmen, confidential employees, professional employees, watchmen, guards and supervisors as defined in the Act.

2. The certification

On April 2, 1976, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on October 6, 1976, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 12, 1976, and at all times thereafter, the Union has requested the Respondent to furnish certain relevant and necessary information for the purpose of collective bargaining,[12] and to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 12, 1976, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 12, 1976, and at all times thereafter, refused to bargain collectively with the Union as the exclusive repre-

[12] The Union seeks information relating to: names, ages, sex, marital status, dependents, and classifications of all unit employees; individual wage rates of pay for each unit employee; wage structure for minimums and maximums of each labor grade or classification; what fringe benefits are in effect for unit employees such as the number of paid holidays; amount of life insurance and cost; weekly indemnity for sickness and accident benefits and duration of such benefits and their cost; hospital and medical benefits; pension plan; and other related matters.

sentative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices with the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, furnish the Union the requested relevant and necessary information for the purpose of collective bargaining, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Bristol Spring Manufacturing Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Respondent employed at its Plainville plant, exclusive of all office clerical employees, salesmen, confidential employees, professional employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 6, 1976, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 12, 1976, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)-(5) of the Act.

6. By refusing on or about October 12, 1976, and at all times thereafter, to provide the above-named labor organization with certain relevant and necessary information requested by it for purposes of collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, and refusal to provide relevant and necessary information for the purposes of collective bargaining, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bristol Spring Manufacturing Company, Plainville, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees of Respondent employed at its Plainville plant, exclusive of all office clerical employees, salesmen, confidential employees, professional employees, watchmen, guards and supervisors as defined in the Act.

(b) Refusing to provide the above-named labor organization with the relevant and necessary information requested by it for the purpose of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, provide the above-named labor organization with the relevant and necessary information requested by it for the purpose of collective bargaining.

(c) Post at its Plainville, Connecticut, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. August 24, 1977

Howard Jenkins, Jr.,	Member
John A. Penello,	Member
Peter D. Walther,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to provide the Union with the relevant and necessary information requested by it for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of Respondent employed at its Plainville plant, exclusive of all office clerical employees, salesmen, confidential employees, professional employees, watchmen, guards and supervisors as defined in the Act.

WE WILL, upon request, provide the above-named labor organization with relevant and necessary information requested by it for the purpose of collective bargaining.

BRISTOL SPRING MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 12th Floor, Keystone Building, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

The National Labor Relations Act as Amended, (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 et seq.)

RIGHTS OF EMPLOYEES

SEC. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

TEXT OF AMENDED ACT

Representatives and Elections

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have

such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity

of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section (10)(e) or (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommen-

dations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

No. 80-819

In The

Supreme Court of the United States

October Term, 1980

THE BRISTOL SPRING MANUFACTURING CO.
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR UAW LOCAL 1251

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QUESTIONS PRESENTED

1. Did the court of appeals and the Board use a subjective rather than a tendency to influence standard in determining whether Union payments to employees for giving statements in aid of an unfair labor practice investigation improperly influenced a representation election?

2. Did the court of appeals err in ruling that substantial evidence supported the Board's finding that Union payments to employees for such purpose did not, and were not intended to, interfere with the employees' free choice in an election?

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No. 80-819

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE BRISTOL SPRING MANUFACTURING CO.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION FOR UAW LOCAL 1251

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local

1251,[1] by counsel, respectfully prays that the Court deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unreported (Pet. App. 1a-3a). The court of appeals enforced a Labor Board Supplemental Decision and Order, 247 NLRB No. 34 (1980) (Pet. App. 1b-13b) entered, after an evidentiary hearing, on remand from a decision of the court, 579 F.2d 704 (2d Cir. 1978) (Pet. App. 1c-6c), declining to enforce a prior decision of the Labor Board, 231 NLRB 568 (1977) (Pet. App. 1d-14d).

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1. Hereafter referred to as the "Union." As the charging party before the Board, the Union was permitted to intervene in the enforcement proceeding in the court of appeals.

STATEMENT

On April 2, 1976, the Board conducted a representation election among the Company's production and maintenance employees. The vote was 43 to 36 in favor of the UAW, with 7 ballots challenged; later the parties stipulated that one of the employees who cast a challenged ballot had been ineligible to vote, thus establishing a Union majority.

The Company filed objections to the election alleging, among other things, that the Union had interfered with the election by "financial inducements to employees to demonstrate their support" for the Union. After an administrative investigation by the Regional Director, the Board overruled the objections and certified the Union. Following the Company's refusal to bargain with the Union, the Labor Board, on motion for summary

judgment, issued its decision requiring the Company to honor the certification and bargain with the Union. However, because the Company's objection concerning Union payments to employees raised "substantial and material factual issues," the court of appeals remanded the case to the Board for a hearing on "the purpose and effect" of such payments.

On remand, an Administrative Law Judge, on the basis of detailed findings of fact entered after a full evidentiary hearing, specifically determined that the payments in question were neither intended to affect the outcome of the election nor did they have a tendency to interfere with the results of such election (Pet. App. 10b-11b). The Board affirmed the Administrative Law Judge's findings and his ultimate conclusion that the Union's

conduct did not, and was not intended to, interfere with the employees' free choice in an election (Pet. App. 2b). It reissued the order to bargain.

The facts found by the Administrative Law Judge and adopted by the Board show that the challenged payments were made solely to compensate employees for the time and inconvenience of giving written statements in support of an unfair labor practice charge regarding the alleged discriminatory discharge of two employees. Five employees received $5 each on February 20, 1976 for giving such statements to a Board agent during their lunch period and after working hours on the preceding day. Similar payments were made to four employees who, on March 3, 1976, gave statements after working hours to a Union representative for forwarding to a Board agent. They had expected to

give such statements to a Board agent who did not appear, although they waited for him. Two days afterward, by a clerical error, the Union issued checks to these employees for $20 instead of $5 as requisitioned.

Before giving the statements, the employees were not informed by the Union that they would be compensated. The payments were not linked to supporting or voting for the Union. At the time, pieceworkers' straight time hourly earnings ranged up to about $4 an hour, although at least one employee involved averaged $4.65 an hour.

The Administrative Law Judge found that the purpose of the payments was proper. In summarizing the evidence, he declared:

> "In the final analysis, however, the test of interference is an objective one, that is the tendency of the conduct in question

> to interfere with the results of an election. In my judgment, on the facts of this case, I find that the payments had no such tendency" (Pet. App. 11b).

After finding no impropriety in the $5 payments, the Administrative Law Judge also found that the $20 payments, even if disproportionate, were not objectionable in the light of their purpose, the recipients' understanding of that purpose, and the fact that such payments took place four weeks before the election.

The Board rejected any implication in the Administrative Law Judge's discussion that the $20 payments may have been excessive or unreasonable. It concluded that the evidence failed to establish that, as the Company asserted, the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union (Pet. App. 4b).

The Board also disagreed with the Administrative Law Judge's statement that N.L.R.B. v. Savair Manufacturing Co., 414 U.S. 270 (1973), was inapplicable because it dealt only with inducements expressly intended to influence voters, but it added:

> "As the Administrative Law Judge's treatment of the effects of the payments actually conforms to the standards set out in Savair, we do not disturb his conclusion" (Pet. App. 4b).

The court of appeals (two of whose members sat on the panel that had remanded the matter earlier) enforced the Board's supplemental bargaining order. It reasoned that the Board has wide discretion in the conduct of representation elections; that whether preelection payments interfere with such elections must be determined, not by a per se rule, but as a question of fact; and that in view of the salient facts

found by the Board, its conclusion that the Union's conduct did not affect the election was supported by substantial evidence (Pet. App. 1a-3a).

ARGUMENT

The petitioner contends there are two reasons warranting review by this Court. First, it argues that the Board and the court of appeals improperly used a subjective rather than an objective test in determining whether payments by the Union interfered with the election.

Second, the petitioner asserts that the payments to employees were so grossly disproportionate to their normal wages that they tended to destroy the standards required for a fair election.

Neither of these contentions has validity. Both the Board and the court of appeals did apply the objective test for which petitioner contends, searching out not only the purpose of the payments but their likely effect, if any, on the election. Both the Board and the court of appeals correctly took the view that

whether pre-election payments have the effect of interfering with freedom of choice is a question of fact. In the light of all the facts, the Board found that the Union's conduct in making the payments did not, and was not intended to, interfere with the employees' free choice in the election and the court of appeals concluded that the Board's decision was supported by "substantial evidence" in the record. Because the court of appeals and the Board correctly applied well established legal principles, further review is not warranted.

1. Petitioner asserts that the decision of the Board and the court below conflict with Savair, supra, and rulings by the Fourth and Sixth Circuits, respectively in Collins & Aikman Corp. v. N.L.R.B., 383 F.2d 722 (4th Cir. 1967) and Plastic Masters, Inc. v. N.L.R.B.,

512 F.2d 449 (6th Cir. 1975). It says that, under these decisions, the appropriate test was "whether the conduct has a tendency to influence the election" (Pet. 4), and this test was disregarded both by the Board and the court of appeals.

The argument rests on an assumption that is contrary to fact. The "tendency to influence test" was applied at each level of adjudication. The Administrative Law Judge specifically found, on the facts of this case, that the payments in question had no tendency to interfere with the results of the election. While he deemed Savair inapplicable on the facts, he did not disagree with its principle. The Board disapproved of the Administrative Law Judge's statement on Savair but adopted his conclusion that the payments did not affect the results

of the election, since his treatment of the effects of the payments actually conformed to the standard set out in Savair. The court of appeals sustained the Board's decision.

As the Fifth Circuit stated in N.L.R.B. v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978), the "tendency to influence test requires an examination of the challenged action in light of all the relevant facts." Exactly such an examination led in the present case to the conclusion that no interference with free choice took place.

There is no conflict between the decision of the court of appeals and the decisions of this Court in Savair, of the Fourth Circuit in Collins & Aikman, and of the Sixth Circuit in Plastic Masters. Accord: Kustom Electronics, Inc. v. N.L.R.B., 590 F.2d 817 (10th Cir. 1978);

N.L.R.B. v. Commercial Letter, Inc., 455 F.2d 109 (8th Cir. 1972); 496 F.2d 35 (8th Cir. 1974); N.L.R.B. v. Basic Wire Products, Inc., 516 F.2d 261 (6th Cir. 1975).

2. Ignoring all other circumstances in the case, the petitioner argues that disparity between the employees' normal earnings and the payments of $20 tended to influence the election improperly.[2] This contention, too, does not warrant review.

The Board and the court of appeals correctly denied the petitioner's contention. The Board disclaimed the position that payments to employees must bear an exact correspondence to wages lost or expenses incurred. It found that

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2. To produce the alleged disparity, petitioner calculated normal earnings as equal to the incentive workers' base rate of $2.31 per hour (Pet. 3).

the time involved amounted to as much as three hours, that it took place after work, that it caused inconvenience to the employees, that the purpose of the payments was for time spent by the recipients in giving statements in aid of an investigation of unfair labor practice charges, and that both the recipients and their fellow employees understood that this was the purpose. Responding to one of petitioner's claims based on Savair, the Board concluded that the evidence failed to establish that the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union.

The court of appeals found it significant that the actual purpose of the payments was generally understood, that such payments were not viewed as an inducement to vote for the Union, and

that the checks were distributed one month before the election.

Where a court of appeals has concluded that the Board's decision is supported by substantial evidence, there is rarely need for this Court to intervene. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 490-91 (1951). No such need exists here.

The present case is distinguishable from Savair, supra, in which this Court held that a union's waiver of initiation fees for employees who signed authorization cards before a Board election constituted interference with the election. The facts in this case differ, too, from those in Collins & Aikman, supra, and Plastic Masters, supra. In both those cases employees were paid excessive and unreasonable amounts of money to act as observers for the Union in an election.

In each case the facts supported the conclusion that the Union had bought the endorsement of an influential employee who appeared at the polling place. Here the Union paid neither for support nor endorsement, but simply compensated employees for their assistance in a Board investigation.

This case presents no important question of federal policy. Inasmuch as the overpayments stemmed from a clerical error, the situation is unique and unlikely to be repeated. Indeed, the only issue of federal policy concerns intolerable delay. Under the banner of fairness in representation elections, petitioner has taken advantage of a harmless mistake to frustrate its employees' choice of a bargaining agent for over four and one-half years. No sound reason exists for postponing further the employees' exercise of their bargaining rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 1980

No. 80-819

In the Supreme Court of the United States

OCTOBER TERM, 1980

BRISTOL SPRING MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-819

BRISTOL SPRING MANUFACTURING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board reasonably concluded that union payments to employees for their assistance in an investigation of unfair labor practice charges against the employer did not have a tendency to interfere with the result of a representation election.

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Section 8(a)(1), 29 U.S.C. 158(a)(1) 2

Section 8(a)(5), 29 U.S.C. 158(a)(5) 2

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A3) is not reported. The supplemental decision and order of the National Labor Relations Board (Pet. App. B1-B3) are reported at 247 N.L.R.B. No. 34. The court's initial opinion remanding the case to the Board (Pet. App. C1-C6) is reported at 579 F. 2d 704. The Board's initial decision and order (Pet. App. D1-D14) are reported at 231 N.L.R.B. 568.

JURISDICTION

The court of appeals entered its judgment on September 19, 1980. The petition for a writ of certiorari was filed on November 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in Appendix E to the petition.

STATEMENT

In April 1976, the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1251 ("the Union") won a representation election among petitioner's employees by a vote of 43 to 36, with seven challenged ballots. Petitioner filed objections to the election, alleging, *inter alia*, that the Union used financial inducements to influence employees' votes. After an administrative investigation, the Regional Director recommended that the challenge to one ballot be sustained, that the Company's objections be overruled, and that the Union be certified as the employees' bargaining representative. The Board certified the Union, rejecting the Company's exceptions to the Regional Director's report. (Pet. App. D3-D4.)

Subsequently, petitioner refused to bargain with the Union, claiming that certification was improper in light of

pre-election payments to employees. The Board, on summary judgment, found that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). On application for enforcement of the Board's decision and order, the court of appeals held that unresolved questions of fact concerning the effect of the challenged disbursements precluded enforcement and remanded for an evidentiary hearing on that issue. Accordingly, an administrative law judge conducted a hearing and made the findings of fact summarized below. (Pet. App. B5-B6.)

Two months before the election, the Union filed unfair labor practice charges against the employer for discharging two employees. On two occasions thereafter, employees met after work to give statements to Board agents investigating the discharges. The day after the first meeting, the Union issued checks in the amount of five dollars to each of the seven employees in attendance. (Pet. App. B6-B7.) Because of a clerical error, each of the four employees at the second meeting was paid twenty dollars instead of five dollars. (Pet. App. B8.) The Union representative did not explain that the checks constituted compensation for their assistance in the investigation; the employees involved, however, understood that to be the purpose of the payments. In addition, that is how they described the payments in their discussions with other employees. (Pet. App. B11-B12.)

The administrative law judge found "that the purpose of the payments was for time spent by the recipients in assisting the Union, the assistance consisting of giving statements in aid of an investigation of unfair labor practice charges" (Pet. App. B9). Although noting that there was no basis for concluding that either receipt or knowledge of the payments had affected the vote of any employee, he pointed out that the appropriate test was "objective," *i.e.*, "the tendency of the conduct in question to interfere with the results of an

election" (Pet. App. B10-B11). He found that the payments made by the Union in this case had no such tendency (Pet. App. B11). In each case the payments were received shortly after the statements were made and in some cases the recipients had already signed union authorization cards when the payments were made.

The Board adopted the conclusions of the administrative law judge and agreed that the payments provided no grounds for setting aside the election (Pet. App. B2). In so doing, however, the Board specifically rejected the administrative law judge's apparent assumption that the $20 payments were in gross disproportion to the amount necessary to compensate the employees for their assistance (Pet. App. B3-B4 n.6).

The Board also disagreed with the administrative law judge's statement that *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), was inapplicable here (Pet. App. B4 n.6). The Board noted, however, that because the administrative law judge's "treatment of the effects of the payments actually conforms to the standard set out in *Savair*, we do not disturb his conclusion" (*ibid.*). Accordingly, the Board reissued its original order requiring petitioner to bargain with the Union.

The court of appeals in an unpublished order upheld the Board's decision and enforced its order (Pet. App. A1-A3).

ARGUMENT

1. In *Savair* this Court found that a union promise to waive initiation fees only for employees who signed union authorization cards prior to the election constituted an improper economic inducement to support the union. 414 U.S. at 277. As the court of appeals correctly noted in its original opinion, *Savair* did not establish a *per se* rule that any payments made by a union to employees during an election campaign necessarily invalidate the result of the

election; "[r]ather, the cases establish that cash payments can, under some circumstances, improperly influence an election" (Pet. App. C4; emphasis omitted).

Petitioner does not dispute this principle. Rather, it contends that, in assessing whether the payments here influenced the election, the Board improperly applied a subjective rather than an objective test. The administrative law judge, whose decision on this point was adopted by the Board, articulated and applied the standard suggested by petitioner. Thus, although he found no evidence that the vote of any employee was actually influenced by the payments, he expressly noted that "[i]n the final analysis, * * * the test of interference is an objective one * * *" (Pet. App. B11).

2. The second question presented by the petition—whether "[u]nder the circumstances of this case" the payments should "be deemed so grossly disproportionate that they had a tendency to destroy the standards of conduct necessary for a fair NLRB election" (Pet. 2)—turns on the facts of this case and presents no issue warranting review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, the Board reasonably found the payments not to be disproportionate to the value of the services rendered (Pet. App. B3-B4 n.6):

> [W]e agree[] that the purpose of the payments was for time spent by the recipients in giving statements in aid of an investigation of unfair labor practice charges. That time, from 1 to 3 hours and after normal working hours, involved some inconvenience to the employees. Each of them had to rearrange their [*sic*] evening, leaving their homes, and travel to the location at which the statements were given; two of the four who received $20 took time off from part-time jobs. In light of the fact that the payments were issued within 2 days of the statements and 4 weeks prior to the election[,] that the

> intended purpose was to reimburse the recipients for time spent giving their statements[,] that both the recipients and their fellow employees understood the purpose to be such [,] and that the value of the recipients' time and inconvenience cannot be definitively calculated, we are unable to say that the payments were so grossly disproportionate as to have the effect of making employees feel obligated to vote for the Union.

Contrary to petitioner's assertion (Pet. 4-5), neither *Collins & Aikman Corp.* v. *NLRB*, 383 F. 2d 722 (4th Cir. 1967), nor *Plastic Masters, Inc.* v. *NLRB*, 512 F. 2d 449 (6th Cir. 1975), conflicts with the decision of the court of appeals. Both cases involved payments to employees in connection with union election campaign activities, ostensibly made as compensation for lost wages.[1] Here, of course, the payments were made for services rendered in connection with the investigation of the employer's alleged unfair labor practice in discharging two employees and, as the Board concluded, were reasonable in light of the time spent and inconvenience of giving the statements after working hours. Compare *NLRB* v. *Basic Wire Products, Inc.*, 516 F. 2d 261, 264-265 (6th Cir. 1975).

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[1]In *Collins & Aikman* "the election was decided by one vote" (383 F. 2d at 728) and the union "made false representations of wage rates it had negotiated at a competing plant" (383 F. 2d at 729) *and* induced an employee to serve as a union election observer by promising him a full day's pay for 1 1/2 hours of work, after the employee had refused to serve in return for compensation for actual lost wages (*ibid.*). Similarly, in *Plastic Masters*, the union made substantial payments to a "highly respected and influential" (512 F. 2d at 450) employee and thereby "acquired the services of a man who was in a position of prestige" (*id.* at 451). The court found that "through the economic inducement offered by the Union, the activities of [the employee] as a pro-union advocate may have affected the outcome of a 51 to 46 election" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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